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No. 2721.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Frank M. McKey, Trustee in Bankruptcy of the Estate of Tomlinson-Humes, Incorporated, Bankrupt,

Appellant,

vs.

Eli P. Clark and Los Angeles Warehouse Company, a corporation,

Appellees.

APPELLANT'S CLOSING BRIEF.

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Upon first reading of respondent's able brief we were almost convinced and not a little alarmed by its plausibility, but upon a second reading we discovered that it is not a lion after all, but our old friend Fido—the Innocent Purchaser. The sum total of respondent's arguments go to establish that some court or cautious text-writer has at some time "played safe," by suggesting possible exceptions to the fundamental rules upon which we have based our appeal. It has

been said that cases can be found to prove any side of any issue, and with all respect to the ability and erudition of counsel, we suggest that although they have made of their case a truly enviable presentation, they have failed to meet the vital issues tendered by our opening brief.

Their first point, that the sufficiency of transfer as against creditors is to be determined by the situs of the property, is a valid general rule, certainly applicable to the question of the sale in Los Angeles, but we are not satisfied that this rule is broad enough to cover the New York transaction, for in that instance the property was taken from Illinois to New York, inspected by both parties, colorably and fictitiously held by the buyer for thirty minutes, and then brought back to Illinois. Can it be said that the rights of creditors in property which is thus en route from one jurisdiction to another are to be determined by the law of the state in which the property happens to be at the particular moment when a bill of sale is made? So far as the sale in California is concerned, we believe the *lex situs* is the proper test, and that is the law of Illinois. The May transaction in Buffalo was purely formal, for the purpose of executing further evidence of the sale and bill of sale made in Los Angeles, "and pursuant to the sale therein contained." [Tr. p. 50.]

Respondent next contends that the sale in Los Angeles was a sale by Myers to Clark, and hence not in fraud of the creditors of Tomlinson-Humes, but submits no authority or substantial argument in favor of

this position. He admits (Resp. Br., p. 9) that the option from Myers gave bankrupts authority "to buy the pictures from Myers for certain prices, or to sell them for him," and in the next breath insists that any sale made to Clark must have been made for Myers. An inspection of the first bill of sale to Clark clearly shows that this was not the case, but that bankrupts sold of their own right and in their own behalf. It must be evident that the double aspect of this option also involves a possibility of two relations: one, that of a purchaser from Myers, in which case bankrupts would pay Myers the fixed price of the option; the other relation, that of agent to sell for Myers, in which case they would be bound to hold all moneys received, in trust for Myers as their principal. The two positions cannot be confused and the court will recall that there is no evidence of any right of bankrupt to insist that Myers accept a certain price, except in the event that they exercised their option to buy for themselves. Bankrupt and Clark both knew this and carefully avoided the pitfalls of any fiduciary relation with Myers by wording the contract so that it would not appear to be a sale by bankrupts as agents, but a sale by bankrupts as the present owners of an equitable interest vested and indefeasible. The record shows that bankrupts had the right to sell and convey and they were in possession, and a purchaser from them could therefore acquire a good title and could have compelled delivery of possession and defended against Myers, who was estopped by his own deed from objecting to the validity of the transfer.

When bankrupts made the first bill of sale to Clark it operated as an election to assert their option and consider the property as purchased, and they thereupon became vendors in their own right. We note, moreover, that the statute of California makes conclusively fraudulent, in such case, not only sales by owners, but "if made by a person having, at the time, the possession or control of the property." C. C. Cal. 3440. And even though rules of comity may give effect to the Illinois statute for the purpose of determining the sufficiency of delivery, we bear in mind in testing the delivery, even in Illinois, that it is a question of constructive delivery under a contract conclusively presumed, where it is made to be "fraudulent and therefore void," and the test of the contract is the *lex loci contractus,* under which the contract was not voidable, but void as against creditors, though effective as a sale *inter partes.* Whatever the actual intent of the parties they knew that in California their sale was "conclusively fraudulent" as to creditors. Moreover, the possession of bankrupt, if he was an agent, was the possession of the principal, Myers, and Williams v. Lerch, relied upon by counsel, was based upon findings of "immediate delivery followed by an actual and continued change of possession." The case is misleading, and has been carefully avoided in subsequent decisions and never adopted.

> "The language relied upon by respondent, taken from the case of Williams v. Lerch, has been well and justly criticised."
>
> Murphey v. Mulgrew, 100 Cal. 547.

We think there is no doubt that on March 28th bankrupt was equitably seized of an estate in the paintings and transferred this estate on that day to Clark.

"When an agreement is made for the sale of an estate the vendor is considered as a trustee of the estate sold for the benefit of the purchaser, and the purchaser as a trustee of the purchase money for the vendor. The vendee is equitably seized of the estate and may therefore sell or charge it before the execution of the conveyance. This principle has been applied to estates under contract of sale, although an election to complete the purchase rests entirely with the purchaser."

21 A. & E. Encyc. 934.

The relation of principal and agent never existed as between Myers and bankrupt, but solely the relation of vendor and vendee. The facts are parallel to those in Robinson vs. Easton, 93 Cal. 80, in which the court adopted the ruling in Ex parte White L. R. 6 Ch. 397 in the following language:

"Goods had been consigned by Towle & Co. to Nevill for sale, and if sold, to be accounted for at a fixed price. Nevill sold the goods upon such terms and at such prices as he chose, and it was held that the moneys received by him upon such sales, and standing to his credit upon the books of his banker, were his own moneys, and did not belong to Towle & Co.; that the contracts of sale made by Nevill were made by him on his own account, and not as agent for Towle & Co., the court saying: "The business which Nevill carried on with the goods of Towle & Co. has been called a cotton agency business, and the word 'agency,' in its prima facie

sense, seems to imply the relation of principal and agent, and not of vendor and purchaser. But it has been admitted in the course of the argument, that there is no magic in the word 'agency.' It is often used in commercial matters where the real relationship is that of vendor and purchaser, and the question is, whether the dealings between Mr. Nevill and Messrs. Towle & Co. with reference to these goods resulted in the relationship of vendor and purchaser, or in the relationship of principal and agent." "If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent. The contract of sale which the alleged agent makes with his purchasers is not a contract made on account of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by the contract."

In a very recent case in California we find the same ruling upon facts very close to those at bar. Defendant was a broker who had an agreement with the owner of a fee to sell to the broker at a certain price and an agreement with the plaintiff to buy from the broker at a certain price. The court reversed a judgment against the broker as an agent and said "It may well be that in the present case the difference between the amounts of the first payment called for by the two contracts of sale, viz, the sum of $400 remained in the hands of Rizzo as a principal." De Pavo vs. Rizzo, 20 C.A.D. 642.

Respondent argues that if the sale from bankrupt to Clark in Los Angeles was a present sale, it was a sale from Meyers to Clark, "and hence not in fraud of the creditors of Tomlinson-Humes." Counsel admit that bankrupt did have power to sell and convey and say that bankrupts' contract with Myers had "a double aspect, authorizing Tomlinson-Humes to buy the pictures from Meyers for certain prices, or to sell them for him." If this be true, we must determine which aspect the bill of sale of March 28 bears by inspecting its terms. It recites that the source of bankrupts' interest was an option to buy from Myers, and thereupon in express terms Clark purchases, not from Myers, but from bankrupt. Bankrupt, therefore, was not making a sale for Myers, but for bankrupt, and Myers never made a bill of sale to Clark, but made one to bankrupt. The bill of sale to Clark provided that bankrupt should dicker with Myers and attempt to get a concession upon the price and keep such concession, which no agent of any shade of honesty could do against his principal.

"It being understood that second party allows first party to make the profit represented by the difference between the price which they have to pay Mr. Myers and the purchase price herein named." [Tr. p. 56.] Bankrupt never allowed Myers to come in contact with Clark's agent until after bankrupt had acquired a bill of sale from Myers, but bankrupt became Clark's agent "from March 28, 1912, * * * hereby clothed with full power and authority to sell all of said pictures and each and every one of them as hereinbefore

provided, and to assign, transfer and deliver the same on making sale or sales and to receive and receipt for the purchase price thereof." [Tr. p. 61.]

Counsel argues (Brief, p. 9) that the exercise of the option would involve a payment of the price, but there is nothing in the record to show that payment of the price to Myers was a condition precedent, and there is no presumption that there was. Where one has an enforceable option and elects to exercise it, he is immediately vested with an equitable title to the property. All that the record shows about this option is that it gave bankrupts the power to sell and convey a good title, and respondent admits that it also authorized bankrupt "to buy the pictures from Myers for certain prices." (Resp. Br., p. 9.) It may be that Myers was not bound to execute a bill of sale to bankrupt until he received his money, but if so, this is outside the record, and it is of no importance, for the reason that a bill of sale is not essential to a transfer of personalty, and the question when title passes is to be determined from the intention of the parties as evidenced by their acts. We submit that the acts of the parties in Los Angeles clearly indicate that bankrupts considered they had an enforceable option, amounting to an absolute right, to the Hogarth pictures upon election to buy them, and that they thereupon sold to Clark, who "hereby purchases."

Two months later, when bankrupts made their second bill of sale to Clark [Tr. p. 50], it was made "subject to the terms of sale contained in the agreement of March 28, 1912, between the parties hereto

and pursuant to the sale therein contained." Certainly, if there is any distinction between an agreement to sell and an agreement of sale, the contract made in Los Angeles was an agreement of sale by its express terms, and was so denominated in the bill of sale thereafter made. Counsel for respondent even admit "some portions of it looking toward a present transfer." (Br. p. 13.)

We submit that as between Myers and bankrupt and Clark, title passed to Clark on March 28, in Los Angeles. That at least was the belief of both Clark and bankrupt, for Clark in the same instrument made bankrupts his selling agents from that moment, "clothed with full power and authority." [Tr. p. 61.]

> "Where a bargain is made for the purchase of goods and nothing is said about payment or delivery, Bailey, J., said the property passes immediately so as to cast upon the purchaser all future risk if nothing remains to be done to the goods, although he cannot take them away without paying the price."
>
> Hatch v. Standard Oil Co., 100 U. S. 124.

> "Contracts for the purchase and sale of chattels, if complete and unconditional and not within the statute of frauds, are sufficient as between the parties to vest the property in the purchaser even without delivery, the rule being that such a contract constitutes a sale of the thing."
>
> *Ibid.*

Respondent argues very confidently that the courts of Illinois have gone astray and failed to properly con-

strue their own statutes, but we need not take this contention seriously, as this court is bound as to the meaning of the Illinois statute by the construction put upon it by the Illinois courts. Counsel admits that the rule in Illinois is "very much like that established by the statutes in California. They have, however, made an exception to the rule." This exception counsel cull from certain chattel mortgage cases to the effect that the vendor may retain possession if the conveyance so stipulates. This rule has no bearing upon ordinary sales of chattels, but only upon such incumbrances as chattel mortgages and sales of bulk articles which are by law required to be evidenced in writing and filed for record. Thus, Thompson v. Yeck, cited as authority for this exception, brief, page 20, turned upon the sufficiency of the instrument under the chattel mortgage act of Illinois. In Huschle v. Morris, 131 Ill. 587, the court held delivery to be absolutely essential to a complete sale as against creditors. In Morris v. Coombs, 109 Ill. App. 176, it was held that the retention of possession by vendor is fraudulent *per se* as to creditors, and in Martin v. Duncan, 156 Ill. 274, in which a stock of goods in possession of an agent was sold and possession remained with the agent as an employee for the vendee, the court said that the possession of this third party before sale was the possession of the vendor, and that the character of possession continued to be the same after sale in the absence of a substantial and visible sign of a change of title, and that the sale was therefore void as against creditors.

Respondent argues at length that because bankrupts' attorney, McArdle, thought a bill of sale necessary and thought that the contract of March 28 was executory, therefore it must be so construed. If McArdle ever thought so, it was merely a mistake of law, and of no importance for our purposes. No formal acts or technical conveyances in writing were needed by Clark, and the conveyances in Buffalo were doubtless made in order to add importance and glamour to the already voluminous history of these paintings in the eyes of the next purchaser. The "subsequent transfer," which looms so large in respondent's brief, was an empty and idle act, which merely provided added evidence for the purposes of a chain of paper title.

This brings us to the discussion of the assertion that title passed in New York. Respondent has failed to show a valid transfer as against creditors in California or in Illinois and struggling to the surface for the third time, grasps at the slender straw of a supposed weakness in the New York statute of frauds. We have endeavored to show that bankrupt was in this case, not an agent of, but a purchaser from Myers and a vendor as to Clark at the time of the sale in Los Angeles. The execution of the second bill of sale in New York merely served to evidence a status already attached to the property. Respondent now asserts that title passed in New York from Myers through bankrupt to Clark and cites certain authorities concerning the purchase of real estate by trustees to show that such trustees are mere conduits, having no real title to the property. They admit that this is

a technical rule of real property, consequent upon the theory of resulting trust and cite only the case of Zenda M. & M. Co. v. Tiffin, 11 Cal. App. 62, a case in which we find a great deal of comfort. In that case, a contract for a deed was entered into in September. Cummings, the prospective grantor did not acquire title until the following February. In the meantime, a judgment had been docketed against Cummings. The court said:

> "Appellant does not claim that he (Cummings) owned the property at the time of the docketing of the judgment, but contends that he subsequently acquired 26/48 interest. Whatever interest Cummings acquired was by virtue of the Parlow agreement pursuant to which, Parlow signed and acknowledged deeds to the property, making Cummings grantee therein. * * * The rights of Cummings of whatever character or value were on September 8, prior to the docketing of the judgment, actually transferred to Bryson and associates. Thereafter Cummings had and could have no interest in the property. He had parted with all interest in or control over it."

So in the case at bar, bankrupt acquired no title or interest by the bill of sale from Myers, for as between bankrupt and Clark he had parted with his vested interest in the property by his bill of sale to Clark in Los Angeles. The personal property law of New York state, codified in 1909, chapter 45, sec. 36, provides:

> "A resale of goods and chattels in the possession or under the control of the vendor and every

assignment of goods and chattels by way of security or on any condition, but not constituting a mortgage, nor intended to operate as a mortgage, unless accompanied by an immediate delivery, followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor, or persons making the sale or assignment, including all persons who are his creditors at any time while said goods or chattels remain in his possession, under his control, or subsequent purchasers of said goods and chattels in good faith, and is conclusive evidence of said fraud unless it appears on the part of the persons claiming under the sale or assignment that it was made in good faith, and without intent to defraud said creditors or purchasers."

A subsequent amendment, Session Laws, 1911, chapter 571, sec. 107, provided:

"Where a person having sold goods continues in possession and such retention is fraudulent in fact or is deemed fraudulent under the rule of law, the creditor or creditors of the seller may treat the sale as void."

Unless this provision is inconsistent with sec. 36, quoted above, they are both to be considered as the New York law. Sec. 36 raises a presumption of fraud, whereas sec. 107 puts the burden upon the creditor alleging fraud. It is quite possible that a knowledge of this slight difference between the law in California and Illinois and that in New York brought about the arrangement by which the pictures were shipped to New York and the parties all met there

"with great formality" to make a colorable transfer of possession for thirty minutes. Respondent urges that the sale was made in New York, and that creditors cannot defeat it without showing fraud; but even if this were so, respondent admits that we have sustained this burden for he says (brief, page 31): "The property was later delivered to Clark's agent, then at Buffalo, and was held by him for a time and its subsequent return to Tomlinson-Humes, while it may be evidence of a fraudulent intent, does not in this case establish it." Sec. 107, quoted above, provides that even if retention is not fraudulent in fact, the sale is void as against creditors if it is "deemed fraudulent under any rule of law," and as we have seen that the rule of construction adopting the *lex situs* is merely a rule of comity, we may well say that we have here a legislative recognition, not only of the common law rule in regard to delivery, but of the right of a court in another jurisdiction to consider itself free under this clause to give effect to rules of law existing in the jurisdiction of that court, without infringing on the *lex situs*.

Respondent argues (Br. pp. 36 and 37) that the agency of the bankrupt to sell for Clark was terminated by the bankruptcy, and that bankrupts' possession of the paintings was merely incidental to the power of sale, and that their right of possession terminated as soon as the agency was terminated.

The court will observe that the possession of the paintings in the bankrupt was not merely incidental to the power of sale, but was a possession guaranteed to

them for a valuable consideration during a fixed time, and that it was therefore during that time an irrevocable power, and a possession of which they could not be deprived by any act of court. This being so, it does not fall within any of the citations set out so laboriously by counsel but within the express exception to that rule set out in these very citations. The exception to which we refer deals with agencies which are not revocable by the act of the principal.

The citation in 31 Cyc., page 1312, is followed by the words:

> "But the bankruptcy of the agent will not destroy any right he may have under a power coupled with an interest."

And we read upon the following page:

> "And where the power of attorney forms part of a contract and is security for money or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms, and if not so is deemed irrevocable in law, and the power may be exercised at any time, and is not affected by the death of the person who created it."

But, as we have said in our opening brief, we do not care to be led afield into this discussion of whether the agency is or is not still alive, for we think it is not necessary to our rights in this case. The trustee does not sell by force of any agency, but as the representative of creditors vested with a lien amounting to an express interest in the property, a right *in rem*. It is this right in the *res*, this property in the paintings

themselves, which will be sold by the trustee, and not the right or interest of Clark, if he still has any. The sale will be a sale of the interest of the creditors in the property, and not any interest of Clark in the property. The trustee here claims an interest *in rem,* whereas the respondent thinks we are seeking to assert an interest *ad rem,* that is, a right to acquire an interest in the property rather than an acquired and vested interest in the property.

Much has been made of the contention that the appointment of bankrupts as selling agents imposed upon them a responsibility which was personal, and which involved a relation of peculiar confidence in their ability. There is no evidence before this court that there was any reliance on the part of Clark in any special or peculiar skill or ability in the bankrupt. If it can be said that any reliance of any character is shown, that reliance went only to the retouching, framing—experting, as the record calls it,—of these pictures, which the evidence shows was completed at the warehouse of bankrupt in Chicago before the pictures were removed to Buffalo. What remained to be done by bankrupt, as was said in Janin v. Browne, 67 Cal. 37, could be done as well by another as by the bankrupt, and it is the general rule, as set out in Husheon v. Kelly, 162 Cal. 656, that the theory of reliance upon a peculiar ability in the agent does not apply where the act to be done by the agent may as well be performed by others.

In the case at bar nothing remained to be done to the pictures except to sell them, and it has always been

held that a sale, whether of realty or personalty, is not a reliance upon peculiar ability of the agent in the absence of an express showing. Clark was upon the stand, but was not asked about this matter, and there is no testimony, either in the deposition of the evidence upon the stand, tending in the least manner to show any reliance upon peculiar ability of bankrupt.

Respondent cites *In re* Wright-Dana Hardware Co., 211 Fed. 908, to the effect that where property is in the possession of an assignee for sale, it is not to be deemed property which, under section 70(a) of the Bankruptcy Act the bankrupt might by any means have transferred, but in that case the bankrupt had no contractual right to possession, and he might be deprived of it at any time. He had no vested right of possession, no valuable consideration in the nature of a fixed term upon which he could insist, and which, as we have shown, would render the agency irrevocable. Moreover, the court says in that case:

> "But the trustee does not assert any fraud in this case; on the contrary, his counsel admitted in his argument that there had been no fraudulent transfer."

In the case at bar, however, we find a transfer which is deemed fraudulent at law, whether actual fraud exists or not, and the cited case is therefore not authority upon the point it is supposed to support.

The other federal cases cited by respondent were all decided before the amendment of 1910. In all of these cases there was no interest in the bankrupt which could

pass to his trustee before the amendment of the Bankruptcy Act, nor perhaps under the present law, but in the case at bar bankrupt had a valuable right, to-wit: the right to possession until the expiration of his contract, which right could not be taken from him by Clark, nor terminated by Clark's death, nor was that right terminated by the bankruptcy of Tomlinson-Humes.

Taylor v. Burns, 203 U. S. 120, is quoted to prove that in the case at bar, there is not a power coupled with an interest. In that case, an agent had power to "sell and negotiate" and this power was held to confer no title in the agent. The action was one to quiet title to mining claims and we again find counsel striving to find refuge in technical rules applying only to real property. The court said that "Nowhere in the instrument does the party of the second part assume any obligations." It was therefore an unilateral promise and a mere authority not coupled with an interest. The court relied upon Hunt v. Rousmanier, 8 Wheat. 174, in which Mr. Chief Justice Marshall had said:

> "Rousmanier therefore could not during his life, by any act of his own, have revoked this letter of attorney, but does it retain its efficacy after his death? We think it does not. We think it well settled that a power of attorney, if irrevocable during the life of a party, becomes extinct by his death. * * * A conveyance in the name of a person who was dead at the time, would be a manifest absurdity."

It must be apparent then that this case has nothing to do with the one at bar. The court there said that even this naked power was irrevocable during the life of the grantor, and even if the power at bar had been only a naked power, neither of these cases support any theory that bankruptcy would operate to revoke it. The bankrupt is still alive and may, if the trustee so elects, continue even the relation of agency, but as we have shown, the trustee herein is not limited by the rights of the bankrupt, but succeeds to all his beneficial powers. The appointment of bankrupt was not a mere possibility of acquiring a commission. It was a definitely beneficial interest conveyed upon valuable consideration upon the basis of which bankrupt expended money, which his creditors might otherwise have had, and many of his liabilities may have been incurred in carrying out this very contract.

None of the real property cases cited are in point here for the reason that possession gave bankrupt the indicia of ownership and gave rise to those elements of estoppel which are the basis of all of the substantive rules protecting creditors against sales which are either "fraudulent in fact or deemed fraudulent by any rule of law." Whatever form the facts in this case may take, it is impossible to avoid the conclusion that so far as creditors of the bankrupt are concerned, there was no time from March 15, 1912, when bankrupt first acquired possession, up to the time of the filing of the petition in bankruptcy, when bankrupt was not in possession, sole, irrevocable, exclusive, notorious and open, under a claim of title and with

a right to sell and convey so that as to all the world the property was that of the bankrupt. Myers knew this situation and Clark, the respondent, knew it, and both were willing to allow it to be believed that this was the property of the bankrupt in order that they might profit by a sale. Clark knew that bankrupt had long been in possession, yet he made a contract which was "conclusively fraudulent and therefore void," both where the contract was made in California, and at the place where the property was situated in Illinois; and then at a later date, his agent Bennett was shown the pictures in New York state and within thirty minutes gave up every color of even constructive possession by taking a receipt from the bankrupt. In that state, this sale was void if it was "fraudulent in fact or deemed fraudulent by any rule of law." And we submit that even if the rule of comity goes so far as to give any effect whatsoever to this unnecessary and futile second bill of sale in New York, it must appear that the sale there attempted to be made, was not only fraudulent in fact, because it was an attempt to take advantage of a supposed weakness in the Sales of Goods Act in New York state, but it is to be deemed fraudulent by rule of law, because it was not open and notorious and therefore as against creditors, both Myers and Clark are estopped to set it up. But whatever may be the rule governing this elusive sale, it is very apparent that creditors of the bankrupt estate may set up various rights in this property and those rights cannot be adjudicated in this proceeding in which they are not parties and in which the only issue

is right of possession. The express purpose of the amendment of 1910 to the Bankruptcy Act was to enable the trustees to be in the position of creditors in every jurisdiction, and of every possible complexion of claim. Whatever these various rights may be must be determined in a court of bankruptcy in which all of the creditors may be heard. In the meantime the trustee is to be regarded as a creditor, having a vested lien in the property. It is elementary that one in possession, claiming a vested lien has a right to hold for the satisfaction of his lien and therefore there is no state of facts here, under which Clark can justify his wrongful taking from the possession of the Federal Court in Illinois. Whatever rights Clark may have, he cannot be permitted to forceably remove property from the possession and custody of the Federal Court in Illinois, but must yield to the jurisdiction of that court and establish his claims in the proper manner in that forum.

The decree should be that the respondents deliver to the trustee in bankruptcy the pictures described in the bill of complaint, and held under the injunction herein.

Respectfully submitted,
MULFORD & DRYER,
WILBUR BASSETT,
Solicitors for Appellant.